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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 1030

M. O. COWAN, D. C. WEBB AND VICTOR KLEIN, TRUSTEES UNDER THE PLAN AND AGREEMENT FOR REOPENING THE EAST TENNESSEE NATIONAL BANK,

Petitioners,

vs.

HAMILTON NATIONAL BANK OF KNOXVILLE, AS TRUSTEE FOR THE ESTATE OF HAL S. HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

M. W. EGERTON,
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vs.

HAMILTON NATIONAL BANK OF KNOXVILLE, AS TRUSTEE FOR THE ESTATE OF HAL S. HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

I.

Summary Statement of Matters Involved.

(a) The Pleadings.

This is a suit in equity brought in the Chancery Court of Knox County, Tennessee, by petitioners as trustees under a plan and agreement for the reorganization of the East Tennessee National Bank of Knoxville (which reorganiza-

tion was made effective by the Comptroller of the Currency by virtue of the Bank Conservation Act (March 9, 1933, c. 1, Sec. 207, 48 Stat. 3; U. S. C. A. Title 12, Sec. 207)) against the respondent, Hamilton National Bank, as executor and trustee under the will of Hal S. Harris, seeking judgment on a note in the principal sum of $28,000.00 executed on behalf of respondent's trust estate in discharging its obligation under said plan of reorganization; to subject collateral in the hands of petitioners to the satisfaction of the judgment sought and to enjoin a pending action at law by respondent against petitioners, wherein was sought a replevin of the collaterals held by petitioners. After various motions, pleas, demurrers, not now pertinent, respondent filed an answer denying the right of recovery and a cross-bill seeking the cancellation of the note held by petitioners and a return of the pledged collateral.

(b) The Decision.

The Chancery Court awarded petitioners a decree in accordance with the prayers of their bill.

(c) The Appeal.

From this decree respondent appealed to the Supreme Court of Tennessee, which Court, on *January 22, 1941,* reversed the decree of the Chancery Court of Knox County, Tennessee. A petition for rehearing, seasonably filed, was overruled on *March 8, 1941.*

(d) The Facts.

The case was tried on the pleadings and a stipulation of fact and a summary of the facts is as follows:

1. *On January 19, 1933,* the East Tennessee National Bank of Knoxville, Tennessee, a national banking association, became insolvent, a receiver was appointed and an

assessment of 100% was thereafter levied against stockholders (R. 30).

2. *On April 20, 1933,* a plan of reorganization of the bank having been prepared and submitted to the Comptroller of the Currency, was by him approved, subject to the fulfillment of the conditions of the plan with certain modifications. This approval was given in the exercise of the discretion vested in the Comptroller of the Currency by the Bank Conservation Act (U. S. C. A. Title 12, Sec. 207) (R. 30-34-35-36-37).

3. In general terms, the plan, as approved, provided for the creation of a trust to which all assets of the bank not required in its recapitalization would be conveyed; the delivery to the trustees so created of notes executed by stockholders in the amount of each stockholder's assessment liability secured to the satisfaction of the Comptroller, representing more than two-thirds of the outstanding shares of stock; the delivery to the trust of all the capital stock of the reorganized bank; the waiver of claims of creditors of the bank against the bank and the substitution therefor of claims against the trust, thereby restoring the bank to solvency; the revocation of the existing assessment against stockholders; the liquidation of assets of the trust for the benefit of creditors by the trustees (R. 31 VII, 106-107).

As to stockholders notes, the plan provided:

> "2. Each stockholder agrees to deliver to the Trustees his promissory note in such form as may be prescribed by the Trustees in an amount equal to the par value of all shares of stock owned or held in trust for such stockholders in the association. It is specifically agreed that among the provisions in the said note shall be the following:
>
> * * * * * * *

(b) This note shall be payable:

* * * * * * *

2. On January 10, 1940, unless prior to said date unsecured depositors have received a total of 70¢ on each dollar of the amount of unsecured deposit in the East Tennessee National Bank at the close of business January 18, 1933, * * *.

(c) Until such time as the note given hereunder is called for payment or matures the maker shall be entitled to any income from collateral deposited to secure the same, and the note shall not bear interest; * * *" (R. 31 VII; 111-112).

4. *On May 10, 1933,* the estate of Hal S. Harris, acting through its then trustee, S. V. Carter, consented to the plan of reorganization and executed its note in accordance with the foregoing requirement (R. 31 VIII). Hal S. Harris, in his lifetime, and after his death in 1927, his trust estate, owned 280 shares of East Tennessee National Bank stock, having a par value of $100.00 per share. The assessment made against this estate was thus $28,000.00 and the note so executed on behalf of the estate $28,000.00 (R. 29 V, 30 V). Carter, as trustee, acted on the advice of counsel and at the written request and direction of the life beneficiary of the trust, who also had a general power of appointment over the trust estate (R. 31 VIII; 31 IX; 7, 8). At the time Carter, Trustee, consented to the plan he was Chairman of the Board of Directors of the bank but took no part in the reorganization movement other than to consent for himself individually as a stockholder. At this time the affairs of the bank were in the hands of a receiver, and Carter, prior to the reopening terminated his connection with the bank, and was never again employed by it (R. 41 XXVI).

5. *On December 21, 1933,* the Comptroller of the Currency certified the completion of all acts required in his

approval of said plan and agreement; that the plan was fair and equitable as to all depositors, creditors *and stockholders* and was in the public interest and declared the same to be effective. By carrying out the reorganization plan, the bank was restored to solvency, and the existing assessment revoked both as to consenting and non-consenting stockholders (R. 39 XXI). Non-consenting stockholders (only a few of whom were solvent) representing approximately 2000 shares of stock were thus relieved of liability (R. 40 XXIII; 31 VI).

6. *On January 10, 1940,* depositors and creditors not having theretofore received 70% of their claims (R. 31 X, 32), demand was made for the payment of stockholders' notes pursuant to the terms and conditions of the plan. The Hamilton National Bank succeeded Carter as trustee upon the death of Carter in January, 1935 (R. 3), and, having declined to make payment in response to this demand, suit was commenced (R. 9).

7. The petitioners herein are the present trustees under said plan of reorganization and the respondent herein is the present executor and trustee of the estate of Hal S. Harris.

II.

Jurisdictional Statement.

1. *The jurisdiction of this Court* is based upon U. S. C., Title 28, Sec. 344(b) (Judicial Code, Sec. 237, Amended).

The decision of the Supreme Court of Tennessee, the highest court of said State, sought to be reviewed herein, was rendered and entered January 22, 1941, and a petition for rehearing seasonably applied for, was denied on March 8, 1941, and said decree became final on March 8, 1941. This petition, together with a certified transcript of the record, is filed in this Court within three months after said decree became final.

2. *The Federal statutes involved are:*

(a) U. S. C., Title 12, Sec. 207, part of the "Bank Conservation Act", reading as follows:

> "In any reorganization of any bank under a plan of a kind which under existing law, requires the consent, as the case may be, (a) of depositors and other creditors or (b) of stockholders or (c) of both depositors and other creditors and stockholders, such reorganization shall become effective only (1) when the Comptroller of the Currency shall be satisfied that the plan of reorganization is fair and equitable as to all depositors, other creditors, and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions, and limitations as he may prescribe and (2) when, after reasonable notice of such reorganization, as the case may require, (A) depositors and other creditors of such bank representing at least 75 per cent in amount of its total deposits and other liabilities as shown by the books of the bank or (B) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank or (C) both depositors and other creditors representing at least 75 per cent in amount of the total deposits and other liabilities and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, shall have consented in writing to the plan of reorganization: Provided, however, That the claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the 75 per cent thereof as above provided. When such reorganization becomes effective, all books, records, and assets of the bank shall be disposed of in accordance with the provisions of the plan and the affairs of the Bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed

by the Comptroller of the Currency. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization. (Mar. 9, 1933, c. 1, sec. 20, 48 Stat. 3; May 20, 1933, c. 34, 48 Stat. 72.)"

(b) U. S. C., Title 12, Sec. 66, reading as follows:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name" (R. S. Sec. 5152).

3. *The question presented is substantial because:*

(a) The binding effect of a reorganization of an insolvent national bank under the foregoing Federal statutes and the validity of a consent thereto were determined and denied under State laws. If this decision is permitted to stand, then reorganizations under the National Banking laws and rights and liabilities which result from such reorganizations are subject to control, frustration or prevention by the varying statutes and decisions of forty-eight States, and the action of a Federal agency declaring such a reorganization effective under Federal law is, in reality, valid only to the extent permitted by State laws.

(b) The National Banking laws constitute a complete code for the government of national banks—their reorganization, management, liquidation, reorganization, but if this

decision is permitted to stand, then an exception is grafted onto the code as to reorganizations and an encroachment is allowed by a State in a field heretofore held to be one exclusively for uniform Federal law and regulation.

(c) The denial of a recovery to petitioners by the Supreme Court of Tennessee by application of law, deprives petitioners, as trustees representing thousands of depositors, of a title, privilege or right vested in them by operation of a Federal statute in depriving them of the benefit of this note for $28,000.00; a note executed by a stockholder in order to obtain approval of a plan of reorganization under which an existing assessment of like amount was revoked—an assessment which cannot now be restored; a note relied upon by depositors and creditors in waiving their claims against an insolvent bank; a note executed pursuant to a plan authorized under Federal laws and approved and declared effective by a Federal agency; a note, the title and right to which is vested in petitioners pursuant to the Bank Conservation Act.

4. *The Federal Question Raised.*

The only fundamental question before the Court in this case was the binding effect of a consent to a plan of reorganization of a national bank and the validity of a note executed pursuant to such a plan.

The case could not be decided without deciding this question.

It was raised first in the trial court in the original bill (R. 1, 4 III, 5, 6, 7, 8, 9) and denied in the answer of respondent (R. 18 III, 19, 22). The stipulation of the parties contains the facts upon which it was based (R. 29 to 40). It was decided by the Chancellor in his opinion (R. 4[illegible] 49) and confirmed in the decree entered based upon this opinion (R. 49 to 51).

It was again raised on the appeal of respondent to the Supreme Court of Tennessee in the assignments of error in behalf of respondent (R. 57, 58, 59) and particularly the "Third" (R. 57), "Fifth" (R. 57), and "Twelfth" (R. 59). It was continued in the conclusion of respondent as to the question involved in its appeal (R. 59-60).

Emphasizing their contention that the liability of this estate was created under Federal law (R. 67-68), petitioners replied to these assignments and supported the action of the Chancellor by brief and argument (R. 61 to 67).

The Supreme Court of Tennessee, in its opinion (R. 70 to 85), reviews the reorganization (R. 71-72), considers specifically the authority of the respondent trustee to consent to the reorganization (R. 75 to 81) and holds that the Bank Conservation Act provides "leeway so that infants, non-residents and stock held in trust without powers adequate to act, etc. might be left out and the reorganization proceeded with by those who were *sui juris* and competent and qualified to act for themselves" (R. 78).

The opinion further considered the relationship of Carter, Trustee, to the bank and his trust (R. 81) and finally decided that the Chancellor was in error, reversed his decree and granted the affirmative relief sought by respondent (R. 85).

The opinion and decree were challenged in a petition to rehear seasonably filed (R. 85-86) and the construction and binding effect of the Bank Conservation Act again called to the attention of the court (R. 87 II, 88).

In an opinion in response to the petition to rehear, the Supreme Court of Tennessee affirms its original holding (R. 104) and definitely sustains two assignments of error made by respondent (R. 105), the "Fifth" (R. 57) to the effect that the trustee was without power to consent to the reorganization and the "Twelfth" (R. 59) to the effect that

the trustee, by reason of his position, could not act for the trust estate.

III.

The Questions Presented.

1. Is a trust estate which is a legal owner and holder of stock in a national bank and against which a valid 100% assessment has been made, bound by its consent to a plan of reorganization of the bank and liable on a note for the amount of this assessment executed pursuant to the plan, where the plan of reorganization is proposed under the provisions of the Bank Conservation Act (U. S. C. A. Title 12, Sec. 207) and is made effective thereunder by the Comptroller of the Currency pursuant to the authority vested in the Comptroller by the Act?

2. Is the right of a trustee lawfully owning stock in a national bank to consent to a plan of reorganization thereof under the Bank Conservation Act vested in such trustee as an incident of ownership of stock in a national bank?

3. Can a trust estate lawfully owning stock in a national bank execute a note pursuant to a plan of reorganization thereof under the Bank Conservation Act for the amount of a valid 100% assessment then existing where, under the terms of the plan, the note so executed becomes an asset for the benefit of depositors and the bank is thereby restored to solvency and the assessment revoked, and subsequently question the power of the trustee so to consent?

IV.

Reasons Relied On for the Allowance of the Writ of Certiorari.

1. The Supreme Court of Tennessee has decided a Federal question of substance, and holds that the binding effect of a plan of reorganization of a national bank made effective

under the Bank Conservation Act is determined as to a trustee consenting thereto by local laws and specific powers vested in the trustee by the trust instrument, and not under Federal laws, which decision is probably contrary to the decisions of this Court, including the following:

Deitrick v. *Greaney*, 309 U. S. 190;
Yonkers v. *Downey*, 309 U. S. 590;
Awotin v. *Atlas Exchange National Bank*, 295 U. S. 209;
Forrest v. *Jack*, 294 U. S. 158;
Seabury v. *Green*, 294 U. S. 165;
Jones National Bank v. *Yates*, 240 U. S. 541;
Cook County National Bank v. *U. S.*, 107 U. S. 445.

2. The Supreme Court of Tennessee has decided a Federal question of substance not heretofore decided by this Court, and has held a plan of reorganization of a national bank consented to by a trust estate not binding on the trust estate so consenting. This decision made upon the authority of State law, is contrary to the provisions and purposes of the National Banking laws.

(a) The National Banking Act constitutes a complete code for the organization, operation, liquidation and reorganization of national banks.

Cook County National Bank v. *U. S.*, 107 U. S. 445;
Jones National Bank v. *Yates*, 240 U. S. 541.

(b) A stockholder in a national bank, by accepting stock therein, accepts the provisions of the Act and his obligation is both statutory and contractual in its nature.

Richmond v. *Irons*, 121 U. S. 27 (55).

(c) And among the provisions so accepted is the following:

> "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and

to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name" (Title 12, U. S. C., Sec. 66).

(d) This section binds a trust estate lawfully holding stock in a national bank.

Pufahl v. *Parks*, 299 U. S. 217;
Richmond v. *Irons*, 121 U. S. 27 (55).

See also:

Dixon v. *Cannon*, 32 Fed. Sup. 626 (Affirmed 115 F. (2d) 913).

(e) A reorganization of a national bank under Title 12, U. S. C., Sec. 207, requires a finding by the Comptroller of the Currency, among other things, that the plan of reorganization is "fair and equitable as to * * * stockholders and in the public interest".

(f) This finding by the Comptroller of the Currency, acting under Federal authority, may not be trammeled, controlled or prevented by State law, and the liability of a stockholder created under such a plan so approved binds the trust estate under Federal law "in like manner and to the same extent as the testator * * * or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name" (Title 12, U. S. C., Sec. 66).

Forrest v. *Jack*, 294 U. S. 158;
Seabury v. *Green*, 294 U. S. 165.

(g) The stock of the national bank, being lawfully held by the trust estate, made the trust estate subject to the liability of a stockholder, and the trust estate, being legally subject to the liability, had the right to discharge that liability. The judgment of the Supreme Court of Tennessee denying the binding effect of the action of the trustee in so doing is contrary to the provisions and purposes of the

National Banking laws, and, in substance, nullifies their operation.

3. The Supreme Court of Tennessee has decided a Federal question of substance not heretofore decided by this Court, and holds that a note executed by a stockholder in a national bank, pursuant to a plan of reorganization thereof whereby the bank is restored to solvency and the stockholder relieved from a valid existing assessment, can be invalidated under State law almost seven years after its delivery, and after creditors and depositors have relied on it in waiving claims against the insolvent national bank without regard to the fact that the note so executed was delivered in compliance with Federal laws to accomplish a Federal purpose.

(a) The judicial consequences which flow from the reorganization of a national bank under National Banking laws involve a decision of a Federal, and not a State, question.

Deitrick v. *Greaney*, 309 U. S. 190;
Yonkers v. *Downey*, 309 U. S. 590;
Awotin v. *Atlas Exchange National Bank*, 295 U. S. 209;
Seabury v. *Green*, 294 U. S. 165;
Dinan v. *1st Natl. Bank of Detroit*, 117 F. (2d) 459.

(b) A note executed by a stockholder in a national bank in order to restore it to solvency, or enable it to comply with valid Federal laws, is binding without other consideration.

Deitrick v. *Greaney*, 309 U. S. 190.

(c) And where creditors and others rely on the execution and delivery of such a note and waive claims against a bank in consideration thereof, and the stockholder thereby obtains approval of a plan of reorganization revoking an existing assessment against a stockholder, the stockholder is estopped to question the validity and binding effect of a note so executed.

Deitrick v. *Greaney*, 309 U. S. 190 (196-7);
Brandt v. *Virginia C. & I. Co.*, 93 U. S. 326.

States will not be permitted by statute or decision to discriminate against national banks or in a collateral proceeding set aside determinations of the Comptroller of the Currency lawfully made in order to defeat the collection of such a note.

Seabury v. *Green*, 194 U. S. 165;
Easton v. *Iowa*, 188 U. S. 220 (238).

The decisions of the Supreme Court of Tennessee ordering cancelled a note under these conditions and executed for these purposes is contrary to the decisions of this Court.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Tennessee, demanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of Tennessee had in the cause numbered and entitled on its docket "Chancery Cause No. 10, from Knox County, M. O. Cowan, et al., Trustees, *vs.* Hamilton National Bank, Trustee", to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States and that the judgment therein of said Supreme Court of Tennessee be reversed by this Court, and for such further relief as to this Court may seem proper.

M. O. COWAN, D. C. WEBB and
VICTOR KLEIN, Trustees Under
the Plan and Agreement for
Reopening the East Tennessee
National Bank,

By M. O. COWAN,
M. W. EGERTON,
JAMES L. CLARKE, JR.,
Attorneys for M. O. Cowan, D. C. Webb and Victor Klein, Trustees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No.

M. O. COWAN, D. C. WEBB AND VICTOR KLEIN, TRUSTEES UNDER THE PLAN AND AGREEMENT FOR REOPENING THE EAST TENNESSEE NATIONAL BANK,

Petitioners,

vs.

HAMILTON NATIONAL BANK OF KNOXVILLE, AS TRUSTEE OF THE ESTATE OF HAL S. HARRIS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

I.

Opinions of the Court Below.

The opinions of the Supreme Court of Tennessee have not yet been officially reported but the opinion is found in the Record filed in this cause (R. 70-85) and on the petition to rehear (R. 103-105). Copies of these opinions are attached hereto (pp. 30-48).

II.

Jurisdiction.

1. The jurisdiction of the Court is based upon the Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925. (Title 28, U. S. C. A. 344 b.)

2. The original date of the judgment or decree to be reversed is January 22, 1941 (R. 85). Petition for rehearing was filed February 4, 1941, within the time allowed therefor. (R. 85-86) and the petition for rehearing was denied March 8, 1941 (R. 103-105). The decree became final March 8, 1941.

3. Title 12 U. S. C., Sec. 207, and Title 12 U. S. C., Sec. 66 were drawn in question by petitioners, who specifically set up and claimed rights, privileges and titles thereunder which were denied by the Supreme Court of Tennessee in reversing the decision of the Chancellor.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented, and in the interest of brevity are not repeated here. Any necessary elaborations will be made in the course of the argument which follows.

IV.

Specification of Errors.

The Supreme Court of Tennessee erred:

1. In reversing the decree of the Chancery Court of Knox County, Tennessee, which held that respondent was bound by its consent to the plan and agreement for the reorganiza-

tion of the East Tennessee National Bank, as declared effective by the Comptroller of the Currency, and liable on a note executed pursuant thereto.

2. In reversing the decree of the Chancery Court of Knox County, Tennessee, which held that a trust estate lawfully holding stock in a national bank and against which a valid assessment had been levied, had authority to consent, by its trustee, to a plan of reorganization of such a bank.

3. In reversing the decree of the Chancery Court of Knox County, Tennessee, and holding that a trust estate lawfully owning stock in a national bank and liable for an assessment of 100% thereon was not liable on its note executed pursuant to a plan of reorganization of such a bank under the Bank Conservation Act whereby the bank was restored to solvency and the assessment against the trust estate revoked and was not estopped to question the authority of the trustee to consent to the plan.

4. In reversing the decree of the Chancery Court of Knox County, Tennessee, and holding that because Carter, Trustee, as an individual, was a stockholder, director and officer of the closed bank, he was, as trustee, incapable of acting for the trust estate and thereby, in substance, denying the binding effect of the Bank Conservation Act and the determinations of the Comptroller thereunder.

V.

Summary of the Argument.

1. The National Banking laws constitute a complete code for the organization, operation, liquidation, consolidation and reorganization of a national bank. The rights, powers, liabilities and duties of stockholders consenting to the reorganization of a national bank are determined by applicable Federal statutes and decisions.

2. A trust estate lawfully owning stock in a national bank may consent to a plan of reorganization of such a bank and is bound by its consent under applicable Federal laws.

3. A note executed by a trust estate in an amount equal to a valid existing assessment against the trust estate, pursuant to a plan of reorganization of a national bank made effective under Title 12, U. S. C., Sec. 207, whereby the bank is restored to solvency and the assessment revoked, is a binding obligation of the trust estate.

4. States will not be permitted by statutes or decision to discriminate against national banks or, in a collateral proceeding, to set aside determinations of the Comptroller of the Currency lawfully made, in order to defeat the collection of such a note.

IV.

ARGUMENT.

I.

I. In the first place, it is respectfully insisted that the Supreme Court of Tennessee has decided Federal questions of substance under State laws contrary to the applicable Federal statutes and the decisions of this Court.

The questions for decision in this case flow from the reorganization of a national bank pursuant to Federal laws. These questions involve the rights of petitioners, as trustees under a plan of reorganization of a national bank, against a stockholder consenting to such a plan of reorganization and the binding effect of such a consent; the validity of a note executed by a consenting stockholder pursuant to the terms of the plan of reorganization where the note is required by the Comptroller of the Currency as a condition of his approval thereof; the power of the Comptroller of the Currency to require the execution of

notes by stockholders secured to his satisfaction representing more than two-thirds of the stock in such bank as a condition of his approval of such a plan; the right of a State court to set aside in a collateral proceeding the determinations of the Comptroller of the Currency and to substitute therefor its own conclusions. These are Federal questions.

National banks, as instrumentalities of the Federal Government, are under the paramount authority of the Federal Government.

In *Easton* v. *Iowa*, 188 U. S. 220, it is said:

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they are enacted. These principles are axiomatic, and are sustained by the repeated adjudications of this court."
>
> *Ibid*, page 238.

The Federal laws constitute a complete code for the government of national banks.

Cook County National Bank v. *U. S.*, 107 U. S. 445.

Provision is made by Federal law for their organization (Title 12, U. S. C. 21 *et seq.*), regulation (Title 12, U. S. C. 81 *et seq.*), visitation (Title 12, U. S. C. 161 *et seq.*), consolidation (Title 12, U. S. C. 33 *et seq.*), liquidation (Title 12, U. S. C. 181 *et seq.*) and reorganization (Title 12, U. S. C. 207).

The rights of petitioners are derived from the reorganization of a national bank under Federal statutes and their

validity and extent must be determined under Federal laws and in accordance with the Federal policy they implement.

Deitrick v. *Greaney*, 309 U. S. 190;
Yonkers v. *Downey*, 309 U. S. 590;
Ex Parte Worcester County Natl. Bank, 279 U. S. 347;
Jones National Bank v. *Yates*, 240 U. S. 541;
Dinan v. *1st Natl. Bank of Detroit*, 117 F. (2d) 459.

The consent of respondent to the plan of reorganization and the execution of its note pursuant thereto are consequences which flow from the reorganization as made effective under Federal statutes, and the binding effect of the consent and liability on the note must be determined under Federal laws and in accordance with Federal policy.

Deitrick v. *Greaney*, 309 U. S. 190;
Yonkers v. *Downey*, 309 U. S. 590;
Awotin v. *Atlas Exchange Natl. Bank*, 295 U. S. 209;
Forrest v. *Jack*, 294 U. S. 158.

No State can control, trammel or prevent the operation of these laws or the consequences which flow from them.

Seabury v. *Green*, 294 U. S. 165;
Davis v. *Elmira Savings Bank*, 161 U. S. 275.

It must follow, therefore, that the Supreme Court of Tennessee has decided Federal questions of substance and that, in denying under State laws: (a) the right of a trust estate lawfully owning stock in a national bank to consent to a plan of reorganization thereof; (b) the power of the trustee of such an estate to act for it in consenting to a plan of reorganization; (c) the validity of a note executed by a stockholder pursuant to such a plan of reorganization in response to the requirements of the Comptroller of the Currency; (d) the power of the Comptroller of the Currency in the exercise of the discretion vested in him by statute to approve a plan of reorganization subject to such restrictions, limitations and conditions as he may impose; and (e)

in the effect of the findings of fact made by the Comptroller of the Currency under statutory authority; the decision of the Supreme Court of Tennessee is contrary to the applicable Federal statutes and decisions.

II.

In the next place, it is respectfully insisted that under applicable Federal laws and decisions, a trust estate lawfully owning stock in a national bank may consent to a plan of reorganization of the bank and is bound by its consent.

Provision is made in the Bank Conservation Act for the consent of stockholders to a plan of reorganization (Title 12, U. S. C., 207).

Title 12, U. S. C., 66 specifically recognizes trust estates as stockholders in a national bank and charges trust estates with responsibility as stockholders "in like manner and to the same extent as the testator * * * would be if living and competent to act and hold the stock in his own name".

A stockholder in a national bank by accepting stock therein accepts the provisions of the Act, and his obligations, duties and rights are both statutory and contractual in nature.

Richmond v. *Irons,* 121 U. S. 27 (55).

> "All the terms of that Act are to be read into the ownership of said stock by the trust estate and must be included within the conditions of that ownership as originally imposed by the trust instrument from which the trust derives its powers."
>
> *Dixon* v. *Cannon,* 32 Fed. Sup. 627.

For the protection of creditors, stockholders and the public, the Comptroller of the Currency is charged with the duty of considering proposed reorganization plans and vested with discretion to determine whether or not the plan is fair and equitable and in the public interest (Title 12, U. S. C. 207).

Such a determination by the Comptroller of the Currency in discharge of his statutory duty is not subject to collateral attack.

Richmond v. *Irons, supra.*

It follows, therefore, that under the National Banking Act a trust estate may lawfully own stock in a national bank; that a trust estate, as a stockholder, is subject to the liabilities of a stockholder and has all other rights, duties and powers of a stockholder; that stockholders may consent to a plan of reorganization if it is declared fair and equitable and in the public interest by the Comptroller of the Currency; that such a consent by a trust estate binds the estate under the provisions of the Federal laws.

To hold otherwise is to subject the reorganization of a national bank and the rights and liabilities of depositors and stockholders arising therefrom to the hazards of varying interpretations and possible defeat by the courts and laws of the forty-eight States; to permit an important exception to the rule that the National Banking Acts constitute a complete code for the government of national banks; to make the task of the Comptroller of the Currency in declaring a plan effective almost impossible where banks have stockholders in various States subject to varying State statutes and decisions.

Petitioners' contention, that the power of a trust estate to consent to a plan of reorganization of a national bank is derived from the lawful ownership of stock of a national bank, achieves the uniformity of purpose of the National Banking laws without infringing on the right of the State to determine the lawful ownership of such stock or the liability of a trustee to a trust estate for any wrongful act; is consistent in that it gives the trust estate the power to discharge the duty and responsibility vested in it as a stockholder by the National Banking Acts, and establishes one

standard to guide the Comptroller of the Currency in determining the sufficiency of a consent instead of leaving him wandering in the quagmire of wills, trust instruments, statutes and decisions of forty-eight States.

III.

In the next place, it is respectfully insisted that this trust estate, having invoked a Federal law to secure the reorganization of a national bank by which the bank was restored to solvency and an assessment of 100% standing against the trust estate was revoked, is bound to pay the note which it executed under the Federal law so invoked.

The pertinent facts with reference to this are as follows:

The trust estate was the lawful owner and holder of stock in a national bank. This stock came into the hands of the executor and trustee as a part of the estate of Hal S. Harris (R. 29 V, 30). The bank failed and an assessment of $28,000.00 was levied against the trust estate for which the trust was liable (R. 30). Pursuant to the plan of reorganization, creditors and depositors of the bank waived claims against it so that it could be restored to solvency upon condition that stockholders to the extent required by the Comptroller of the Currency executed and secured notes equal to existing assessments and placed these notes with the trustees to be payable under conditions of the reorganization agreement (R. 30 VI, 31). In order to secure approval of the plan and this waiver of depositors, this trust consented to the plan and executed its secured note (R. 31 VIII). The plan was not declared effective by the Comptroller until after this note was executed (R. 31 VIII, R. 39 XXI). This estate waited until January 17, 1940 (almost seven years) to take any action seeking to be relieved of liability on its note so executed (R. 9).

The note was executed in order to comply with requirements made under a valid Federal law to accomplish the

reorganization of a Federal instrumentality, i. e., a national bank.

The Court, in the recent case of *Deitrick* v. *Greaney*, 309 U. S. 190, held that a note given to a national bank in lieu of an illegal investment was valid and binding on the maker; that the question of the validity of such a note was a Federal question to be decided under Federal law; that such a note was given to accomplish a Federal purpose and the Federal purpose having been accomplished by the delivery of the note, the maker could not be relieved of liability thereon by any private agreement between the maker and the bank to the effect that it was not to be collected.

The instant case comes clearly within this rule—Here the note was executed to accomplish a Federal purpose—and, the purpose having been accomplished by the delivery of this note, the maker will not be heard to assert lack of authority, if indeed such lack of authority could exist.

One who receives the fruits of a transaction will not be permitted to deny its validity while retaining its benefits.

Brandt v. *Virginia C. & I. Co.*, 93 U. S. 326.

Creditors in consenting to this plan of reorganization relied on this note to take the place of an existing assessment liability. This stockholder received the benefits of the plan—a revoked assessment—seven years without interest in which to pay and a possibility of complete avoidance of liability through payment of 70% of claims by liquidation of other assets. It cannot now restore the benefits obtained. It invoked the Federal law to obtain the benefit. Under a Federal law it will not be heard to deny the validity of the obligation it made in order to obtain the benefit.

Deitrick v. *Greaney*, 309 U. S. 190 (196-7).

IV.

Finally, it is respectfully insisted that under its own holdings, the Supreme Court of Tennessee has discriminated

against a national bank, its stockholders and creditors, and has, in a collateral proceeding, in effect, nullified the determination of the Comptroller of the Currency made by him pursuant to the Bank Conservation Act finding that the plan of reorganization is fair and equitable as to stockholders and in the public interest.

In the case of *Young* v. *Phillips*, 170 Tenn. 169, decided May 2, 1936, the Supreme Court of Tennessee held that an executor, a stockholder in a State bank, had authority under general principles of law to make a voluntary contribution to the capital of the State bank, whereby making the contribution the State bank could be restored to solvency and permitted to operate and the estate perhaps relieved from its liability as surety on a depository bond given by the bank.

It seems apparent, under the facts and this decision, that if Carter, Trustee, had been a stockholder in a State bank and acted as he did, his action would be valid. To hold his action as a stockholder in a national bank void unlawfully discriminates against a national bank.

In order to avoid this apparent discrimination, the Supreme Court of Tennessee sets aside the action of the Comptroller of the Currency.

(a) The opinion of the court in substance holds:

That the Bank Conservation Act requires the consent of only two-thirds of stockholders and provides leeway so that others do not need to consent (R. 71-78); that more than two-thirds consented to the plan of reorganization of the East Tennessee National Bank (R. 71-72) and pursuant to that consent, executed notes (R. 72-78); that this excess was not required by the Act and that, therefore, this trust estate did not have to execute its note to make the plan effective; that the Comptroller might have approved the plan without the note of this trust estate having been executed and

delivered; that, if the trust estate had not consented to the plan and had not executed its note, it would not be liable under the plan, and as the assessment was revoked it would not be liable for the assessment; that, therefore, the trustee should not have consented and the estate should not be liable on its note (R. 78).

This holding completely nullifies the authority vested in the Comptroller of the Currency by the Bank Conservation Act to approve "the plan subject to such conditions, restrictions and limitations as he may prescribe" (Title 12, U. S. C. 207), because, in approving this plan, the comptroller approved it subject to a condition which required more than two-thirds of the shares of stock to be represented by notes *secured to the satisfaction of the Comptroller of the Currency* (R. 36 (5)).

In order to make the plan effective under the Act this condition had to be met. The holding of the Supreme Court of Tennessee, in effect, denies the power of the Comptroller to impose a condition in his approval of a plan of reorganization and leaves him with authority limited to accepting or rejecting a plan tendered to him in the form tendered. This is contrary to the express provisions of the Act. The holding of the Court that the Comptroller might have approved the plan without the execution of this note is based on pure speculation (without a word of proof) as to what the Comptroller might have done under other conditions. The facts are this note was required (R. 36 (5)). It was given (R. 31 VIII). The plan was approved with this note as an asset delivered to the Trustees. The Supreme Court of Tennessee disregards these facts, speculates on others, and in a collateral proceeding, nullifies the action of the Comptroller requiring this note and approving the plan with its present.

(b) The opinion of the court in substance holds:

That the plan of reorganization was "charged with peril" (R. 80), was "dangerous" and "delicate" (R. 105) and unlikely to be beneficial (R. 78-79); that Carter, Trustee, was individually a stockholder in the bank and had for years been an officer thereof; that Carter acted in good faith but subconsciously feared disaster and litigation for himself if the reorganization failed; that, therefore, his own interest was antagonistic to that of his trust, and under these conditions, the trust estate was not bound by its consent or note.

Of necessity this holding in a collateral proceeding sets aside the determination of the Comptroller made by him in discharge of his statutory duty and substitutes therefor a determination of the same question by a State court.

The Comptroller found that the plan was "fair and equitable * * * as to stockholders and in the public interest".

The Supreme Court of Tennessee finds that the plan was "charged with peril" and "dangerous and delicate".

The Comptroller determines that the plan—is fair and equitable—*and in the public interest.*

The Supreme Court of Tennessee, in effect, finds that the plan is in the private interest of a stockholder and former officer—to relieve him of subconscious apprehension as to disaster and litigation and unlikely to be beneficial.

Again it is called to the attention of this Court that the only antagonistic interest of Carter found by the Supreme Court of Tennessee was a subconscious one—drawn by inference only from the stipulated facts that Carter was a stockholder in the bank and had long been an employee and officer of the bank (R. 81-82). No case has been found which holds that these *facts* would create any antagonistic relationship. Rather they would seem to be an additional qualification for the exercise of good judgment. No benefit was obtained by Carter individually that was not parallel to that obtained by the trust and no liability was incurred

by the trust that was not parallel to that incurred by Carter individually. So there could be no antagonistic special benefit obtained by Carter individually.

Respondent admits that Carter acted in good faith, pursuant to advice of counsel and at the written request and direction of the life beneficiary of the trust estate who also had a general power of appointment by will over the entire *corpus* of the trust.

The theory, in the opinion of the Supreme Court of Tennessee, of the conflict of interest between Carter, Trustee, and Carter, individually, is based on speculation by the Court as to the reaction of Carter's subconscious mind to the fact that he was a stockholder and had been an officer and employee of the closed bank. The opinion in response to the petition to rehear states:

> "On the contrary the opinion disclaims any intention to impute to Mr. Carter 'a wrongful purpose or conscious bias'. Throughout the opinion a distinction is recognized and applied between bad faith and subconscious influence resulting from the circumstances and situation" (R. 104).

This speculation by the Court concludes that Carter, Trustee, while consciously acting in good faith, subconsciously knew that this plan was dangerous and delicate and was for his special benefit, and that, therefore, the interest of the trust and of Carter individually were antagonistic.

The facts that Carter consciously acted in good faith and the plan was fair and equitable and in the public interest are disregarded by the Court and "subconscious influences" substituted therefor.

The result of this speculation directly conflicts with the determination of the Comptroller of the Currency that this plan was fair and equitable and in the public interest.

It must follow, therefore, that the Supreme Court of Tennessee has unlawfully discriminated against a national bank and has, in a collateral proceeding, set aside the determinations of the Comptroller of the Currency.

It is earnestly insisted, for reasons herein and in the petition set forth, that the writ of certiorari be granted and the decision of the Supreme Court of Tennessee be reversed.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX.

OPINIONS OF THE SUPREME COURT OF TENNESSEE.

Knox Equity.

M. O. Cowan, et al., *Trustees,*

v.

Hamilton National Bank, *Trustee.*

Opinion.

This bill was filed by Trustees under a plan for the reorganization of East Tennessee National Bank, to recover judgment on a certain note, in the sum of $28,000.00, dated March 10, 1933, and maturing January 10th, 1940, without interest, executed by S. V. Carter, as Trustee for the estate of Hal S. Harris, and seeking the sale of certain securities pledged as collateral to this note, which is on the usual comprehensive bank form, with provisions for additional collateral on demand, and containing special provisions incident to the particular and unusual obligation it expresses. Incidentally, an injunction was asked restraining prosecution by defendant Bank, successor Trustee to Carter, of an action at law in detinue, brought to recover from the complainants the aforesaid pledged securities. The complainants confessed judgment in the Circuit Court and the injunction thereupon issued. The cause was heard on a stipulation of facts. The Chancellor sustained the bill and gave complainants a decree for the note in the sum of $31,818.56 and ordered sale of the collateral securities. The Bank Trustee has appealed.

Harris died in 1927, leaving a will devising practically all of his estate, estimated at some $75,000.00, to the East Tennessee Savings Bank in trust for his wife, Nina Harris, for life, with power in her of disposition by will. Among these assets was a block of 280 shares, of the aggregate par value of $28,000.00, of the capital stock of East Tennessee National Bank, which had a total capital stock of $2,000,-

000.00. The Savings Bank qualified and acted until August, 1932, when it resigned and was succeeded as Trustee for the Harris estate by S. V. Carter, who continued as such until his death, in January, 1935, whereupon the defendant, Hamilton National Bank, succeeded to this trust.

In January, 1933, the East Tennessee National Bank failed and a Federal receiver took charge. He discovered it to be hopelessly insolvent and made a 100 per cent assessment on the stockholders, under the double liability provision. Meanwhile, interested parties undertook a reorganization of the Bank and worked out a plan which called for a reduction of the capital stock to $1,000,000.00, and the issuance to old stockholders of new stock in this ratio, a concession by depositors, reducing their claims to 70 per cent, payable on prescribed terms, etc., and, in order to insure the ultimate payment to depositors of this percentage, the plan provided for the execution of promissory notes by the stockholders, in the face value, in each case, of the stock held by them, dated March 10th, 1933, and payable January 10th, 1940, this to afford time for collection and application of the assets of the East Tennessee National Bank to the depositors' claims. It was further provided that these notes were to be secured by collateral, or otherwise, pledged by the various makers, and by assignment to the Trustees of the new Bank stock issued to each. The plan could become effective only when signed by the proportion of depositors and stockholders required by the Federal "Bank Conservation Act" of March 9th, 1933, passed to meet just such emergencies, the requirement as to stockholders being two-thirds of the stock outstanding, in this case the sum of $1,333,333.00 of the $2,000,000.00 of stock outstanding.

The Plan was submitted to the Comptroller, who approved it on April 16th, with some modifications of the original draft, not material to note. Finally, after many months, on December 21st, 1933, the required proportion of signatures having been obtained, the Comptroller declared the Reopening Plan effective, and revoked the assessments against all stockholders, whether they had become parties to the Reorganization Plan or not, refunding to all such non-signing and participating stockholders such

sums as had been paid by them on account of said assessments. Thus all stockholders who withheld cooperative obligation awaiting the necessity for them to act escaped all liability. Holders of more than $200,000.00 of this stock thus avoided this liability.

The hopes of those who put over this Plan were not realized, with the result that when the notes executed to the Trustees by the stockholders of the old Bank matured on January 10th, 1940, it was found necessary to proceed to collect in full these notes and appropriate the Bank stock, in order to meet the demands of the depositors secured thereby, who had received up to that time but 15 per cent of their deposits.

At this point the Hamilton National Bank, successor Trustee for the Harris estate, being advised that the execution of the note of $28,000.00 by Mr. Carter, as the then Trustee of the Harris estate, and his pledge of an equivalent amount of the securities of the estate, was not authorized, either by the terms of the trust created by the will of the testator, or by any Court order, and was not binding, repudiated this attempted obligation and, after demand upon the Trustees for a release and return of the pledged securities, brought the action before mentioned in detinue, in the Circuit Court, which action was enjoined, as aforesaid, and the contest was converted into its present form in the Chancery Court.

Summarizing the contention of the parties, for the Trustees under the Reopening Plan it is argued that Carter, as Trustee for the Harris estate, was empowered by the broad terms of the will of Harris to execute this note and pledge the securities of the estate for its payment, without application to, or the approving decree of any Court; that in the situation then presented, involving liability for assessment of 100 per cent on the stock of the estate, the proposed Plan afforded a reasonable promise of protecting and profitable results, and was such as would commend itself to the best judgment of a prudent and reasonable man; and that Carter acted in good faith and in the exercise of this prudence and judgment. Reliance is had on the fact that Carter himself, holding 300 shares of this stock, followed this course on his own behalf; that others in large

number did likewise; and, also, that Mrs. Nina Harris, the widow and beneficiary of the Harris Trust, herself signed a paper addressed to Mr. Carter giving her approval. Expressions in the opinion of this Court in *Young* v. *Phillips*, 170 Tenn. 169, are quoted from and relied on to the effect that, when "the utmost good faith" appears, whether or not "prudence and good judgment" have been exercised by one handling trust funds (in that case executors) must be tested "in the light of the conditions at the time presented", and "not from the illumined view of subsequent events."

On the other hand, on behalf of the Harris Trust estate and the widow and others to whom it will pass after her death, it is contended that the will of Mr. Harris, neither by express terms nor implication, conferred any such power on the originally appointed Trustee, East Tennessee Savings Bank; that if it could be so construed, Carter, as successor of the Bank, received no such power; that prudence in the exercise of his responsibility to these beneficiaries of this spendthrift Trust, as well as a legal obligation, demanded of this Trustee that he submit to the Court an issue not provided for by the testator and so fraught with peril to his beneficiary; that Mr. Carter was fettered by his personal interests in the success of this reorganization scheme and was thus disqualified, being not only a large stockholder of the failed Bank, but a director and its salaried executive head, so that he would be the incidental recipient of large benefits from the putting over of the Plan, in which these beneficiaries of the Harris Trust, for which he undertook to act, could not share; that, since the obligation he was called upon to assume for his trust was ono for the benefit of the banking corporation of which he was a director and executive officer, he was thus dealing with trust funds for his own benefit, which the law will not permit; that a conflict thus arose and that no man can serve two masters, certainly not his own interest where a trust is involved.

The questions presented are not wholly free from difficulty. It becomes necessary to construe the will of Mr. Harris in the light of its attendant circumstances, and review in further detail the history of the connection of

Mr. Carter with this trust he assumed thereunder, particularly with reference to his assumption of authority to execute the obligation in issue.

Mr. Harris had held this stock in the East Tennessee National Bank for some years before his death in 1927. The East Tennessee Savings Bank was a subsidiary of the National Bank, its stock being held by the stockholders of the National Bank in equal proportions to their National Bank holdings, and its directors and officers being identical. Mr. Carter had been the President of both. Mr. Harris had been a director. This situation doubtless led to the selection by Mr. Harris of the Savings Bank as Trustee of his estate,—having all confidence that the welfare and protection of his wife would be thus insured throughout her life, not only from the wiles of others, but from her own lack of experience in financial affairs. We here quote the pertinent paragraphs of this will:

"2. I give, devise and bequeath to my beloved wife, Nina Harris, all the rest, residue and remainder of the estate and property, real, personal and mixed, of every kind and character, and wherever situate, of which I may die seized and possessed, with full power and right to dispose of the same by last will and testament; but I hereby put in trust in the East Tennessee Savings Bank, of Knoxville, Tennessee, as Trustee, for the sole benefit of my wife, all of said property for and during the full period of her natural life, with full power in said Bank as such Trustee to possess, manage and control all the same, paying over to her at regular intervals such parts or all of the net income therefrom as she may desire and request to be turned over to her, she to be free to handle and dispose of such parts or all of said net income as may be so turned over to her during her natural life in such manner as she may see fit, but any part of said net income, not so turned over to her to become and be a part of the corpus of the property in the hands of the Trustee for disposition by her by last will and testament. * * *

"in the handling of said property so placed in trust, the Trustee is given full power to buy, sell, exchange and invest in properties and securities the same as the absolute owner might do, during the period of Trusteeship; but caution,

prudence and conservatism is enjoined upon the Trustee, and safe and sound securities shall at all times be chosen for acquisition, even though yielding a lower rate of income, than other yielding a higher rate of income but of questionable safety and soundness. * * *"

The concluding paragraph appointed the Savings Bank executor and trustee without bond.

By the fifth assignment of error, appellant challenges the failure of the Chancellor to decree "that the attempted execution of the Reopening Agreement and of the alleged promissory note on which recovery was allowed, and the pledge of the trust assets as collateral thereto, were done by Carter, as Trustee, in violation of the provisions of the trust under which said Trustee was purporting to act and contrary to the law, because execution of the Reopening Agreement and of the note and pledge of the collateral were clearly beyond the powers of Carter, Trustee, to do, the will only authorizing the buying and selling of properties and securities in a conservative manner for purposes of reinvestment and not for entering into such speculative agreements and obligations."

It is clear that no power is expressly conferred by this instrument on the Trustee to execute such an obligation as is before us, which pledges a large proportion of the trust estate in drastic terms, and which also involved subscription for other and new stock carrying a double liability in the sum of $14,000.00 in the reorganized Bank. Apparently, no such emergency was thought of by the testator as was presented to the Trustee by the failure of the Bank and the accrual of this double liability. Indeed, it may fairly be conceived that the testator would have contemplated that this Trustee chosen by him, and its officers, including Mr. Carter, would at all times be aware of the internal affairs of this Bank and have most intimate knowledge of its financial condition and would take timely steps to dispose of this liability loaded asset and otherwise invest the proceeds, and thus protect this trust estate against this day of disaster. Distinterested consideration of the best interests of this trust would have prompted such action. At any rate, we think it obvious that the instrument does not cover this un-

looked for emergency. Now it is for just this sort of unforeseen, uncontemplated and unprepared, or provided for, contingency that the Courts are available for instruction and direction. Giving the provisions of the will vesting in the Trustee "the handling of the property so placed in trust," with "full power to buy, sell, exchange and invest in properties and securities the same as the absolute owner might do," the most liberal construction, we find authority only to make and exchange investments from which a return might be expected to provide the income for the widow. And this interpretation is strengthened by the clause immediately following, "but caution, prudence and conservatism is enjoined upon the Trustee, and safe and sound securities shall at all times be chosen for acquisition, even though yielding a lower rate of income than others yielding a higher rate of income, but of questionable safety and soundness." It will be observed that this estate was free from debt, and cases dealing with the administration of estates when creditors' demands were to be met, and incidental obligations would have to be incurred, are not in point. No reason appears why the general rule should not apply, thus well stated in language which fits the facts of the instant case in 26 R. C. L., page 1030;

"A Trustee having power to invest the trust property according to his best judgment, and to pay over the income from time to time to the beneficiaries, and to change any investment at discretion, has no authority to pledge any part of the trust property as security for the payment of a promissory note made by him as trustee, although the money received goes into the trust fund, and is expended for purposes for which the income could be rightfully appropriated."

And, see Perry on Trusts and Trustees, Volume 2, Section 768, P. 1315; Notations in 92 A. L. R., 902, 903; Scott on Trusts and Trustees, Volume 2, Section 191, P. 1042, and cases cited in these text books.

We consider further, in this connection, the argued urgency upon this trustee to act when and as he did as a justification of his course. Counsel for the trustees apparently proceed upon the supposition that, upon the ques-

tion of whether or not Mr. Carter would execute for his trust this Reopening Plan and the note for $28,000.00 and pledge the trust collateral to secure it, he had presented for immediate adoption but one of two alternatives, either to pay the assessment of $28,000.00 which had been declared by the Comptroller and suffer this loss, or to put his trust in on the Plan and incur the incidental obligations. And it is insisted that in this situation, in the light of the conditions then present (*Young* v. *Phillips,* supra), the trustees acted, not only in good faith, but with reasonable judgment and prudence.

Now we are strongly impressed that he had then open to him two other alternatives, in the adoption of either one of which he would have been in the exercise of far greater prudence and better judgment; and we are further persuaded that, but for the quite apparent fact that his interest in the accomplishment of this Plan of Reorganization was so great that his judgment as to what was best for his trust was affected thereby, he would have adopted one of them. In the first place, the Courts of Equity are available for just such contingencies. Here was a situation that, of course, had not been foreseen by the testator, and for that reason was not provided for in the will. No express power had been conferred, and none clearly by implication, upon this Trustee to incur this unusual obligation. It is in just such cases as this that the trustee, conceiving his trust to be imperiled, and being without conferred power to act, must go to the Court for relief. So may be brought into pay a principle which this Court has adopted and applied in our cases of *Bennett* v. *Nashville Trust Co.,* 127 Tenn., 126; *Weakley* v. *Barrow,* 137 Tenn., 224; *King College* v. *Anderson,* 148 Tenn., 328, and others. As said in the course of the opinion in a leading case, *Curtis* v. *Brown,* 32 Ill., 201, "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency." But such relief must be by

the Court. It would set a dangerous precedent to permit any testamentary trustee to thus exceed his granted powers, as his individual judgment, however good, and however honestly exercised, might dictate.

The suggestion is made that Mr. Carter did not take this course because of the delay incident, but this is in no sense an adequate reply. It would have taken but a brief time, and it is quite significant that, while this Plan was submitted to the Comptroller in April, it was not finally accepted and closed until late in December. It is, of course, utterly unreasonable to say that in this long period, while this matter was being kept open and, doubtless, much considered and discussed, with arguments pro and con being offered, there was no opportunity to take this course which the law contemplates.

And the second alternative is supported by somewhat these same facts, that is, this Trustee, even if it be conceded that it reasonably appeared to be to the best interest of his trust that this plan should be perfected, certainly was under no compulsion to sign up and thus obligate his trust as early as May 12th, when the matter remained open for acceptance until December 22nd. It will be borne in mind that under the terms of the Act it was only necessary to have two-thirds of this two million dollars of stock enter into and agree to become parties to the Reopening Plan. (It is true that in the course of his letter in April the deputy Comptroller mentions $1,800,000.00 as the amount of stock to be subscribed, but this is not required by the Act, is unexplained and was quite apparently disregarded, because there never was that amount subscribed.) The fact, obvious now and which should have been appreciated then, is that, if this Trustee had merely postponed signing up for his trust, he would have saved for the trust the entire $28,000.00, since it is stipulated that none of the holders of nearly $250,000.00 of this stock, who failed or refused to sign up, were required to pay, or lost, one dollar on account of this assessment. In this connection, it may be noted that in the passage of the Act of Congress of March, 1933, provision was made for just such a situation, in that only two-thirds of the stockholders were required to give their assent to a reorganization plan, thus

leaving leeway so that infants and non-residents and stock held in trust without powers adequate to act, etc., might be left out and the reorganization proceeded with by those who were *sui juris* and competent and qualified to act for themselves. All of the facts and circumstances would seem to have impressed on Mr. Carter the unlikelihood that his plan of reorganization would ultimately be beneficial, even if adopted, and the desirability of withholding the assent of his trust until the last moment.

While no attack is made upon the administration of this trust by the original Trustee Savings Bank, or its successor, Mr. Carter, except in this one particular, it is difficult to avoid the inquiry, so plainly suggested by this record, why the Trustee continued to carry this double indemnity stock asset throughout so dangerous and disastrous a period, particularly to banks, as began in 1929 and extended to the spring of 1933, when all the banks in this country were closed by executive order. Certainly, prudent men everywhere were conscious throughout this period of great potential danger of the continued holding of such an asset, always considered of doubtful quality for a trust estate. And, in addition to this, it is hardly possible to understand why the officers of this Savings Bank, including Mr. Carter, who were also the officers of the National Bank, were not in a position to know at least something of the weakness of this particular institution, which was during this period tottering to its fall.

So, in speaking of "the light of the conditions at the time presented", in which this Trustee acted, it must be borne in mind that, if anyone should then have known of the rotten condition of this Bank's assets, and was in a position to appreciate the improbability that depositors could ever realize 70¢ on the dollar, it was Mr. Carter, who had grown up and lived intimately with this institution since 1887.

Yet another phase of this situation should be mentioned, which strengthens the view heretofore expressed of (1) the duty of this trustee to have invoked disinterested court direction, and (2) his failure to use caution. It was peculiarly the duty of this trustee to submit this matter to the

court before obligating his trust for this double liability, because the legal liability was questionable under all the facts, first, as to whether it could be enforced at all, and, second, whether it was a liability of the trust, or of the trustee himself. While it is true that the Act of Congress which fixed double liability on national bank stockholders extended this liability to trust estates holding such stock, the enforcement of such liability has been successfully resisted under circumstances at least suggestive of those here presented. In 7 Am. Jur., p. 75, it is said that, "If the investment in bank stock was unauthorized, the trust estate has been held not liable for the constitutional or statutory liability of stockholders to the bank's creditors." The text recites the annotation in 91 A. L. R. 260, where cases will be found discussing the question and supporting the principle, although distinguishable on their facts from the instant case. *Bagness* v. *Ives*, 184 Fed. 466; *Golden* v. *Cervenka*, 278 Ill. 409; *Williams* v. *Cobb*, 219 Fed. 63; *Mobley* v. *Phinizy*, 42 Ga. App. 33, and others. Sometimes the trustee has been held liable for a breach of trust in making such irregular, improvident, and unauthorized investments as bank stocks carrying double liability. Certainly nothing in the will of this testator expressly authorized investment of the funds of the estate in this unsafe asset. Quite commonly, prudent managers of estates reject stocks as a class, and particularly stock carrying double liability. It is true that this investment had been made by the testator and was included in the assets devised, but the will did not direct the retention of this, or any other investment, and did not prescribe or limit the discretion of the trustee in this regard, save only to impress in the strongest terms that safety should be the first consideration. Now, as has been seen, not only was this an asset of a character involving risk, but both the savings bank and Carter were chargeable with notice long before the bank failed of its precarious financial condition. No court would have failed to hold that under such conditions it was an improper, unsafe, and therefore unauthorized investment for this estate to hold. Was it not the plain duty of this trustee to challenge, rather than so promptly concede, liability of his trust for this assessment, and certainly to submit to the court the issue presented by

this emergency, so charged with peril to his trust, rather than assume to act with such unnecessary haste? We are forced to the opinion that in the exercise of that prudence which his intimate knowledge of this Bank's condition should have insured for the protection of his trust, Mr. Carter should have at least refused to obligate his trust until the last available moment, when demand for such action appeared to be imperatively demanded to save the Plan from failure.

We come next to consider the apparent violation of another and fundamental tenet of trust administration, the requirement of absolute freedom from personal beneficial interest on the part of the trustee. The twelfth assignment of error is as follows:

"The Chancellor erred in failing and refusing to hold that S. V. Carter was as a matter of law not in a position to act impartially and judiciously in regard to the execution of the Reopening Agreement and the signing of the note and the pledging of the collateral, because he was at the time a large stockholder in the East Tennessee National Bank and was Chairman of the Board of Directors of said Bank, and was up to the closing thereof active in the management of the affairs of said Bank."

Is it possible to say, however free from a wrongful purpose, or a conscious bias, we concede Mr. Carter to have been, and however reasonable and prudent, under the then conditions the course he followed appeared, that he occupied that wholly disinterested position which the law exacts of a trustee? Of course, "nothing in the law of fiduciary trusts is better settled than that the Trustee shall not be allowed to advantage himself in dealing with the trust," 26 R. C. L., P. 1325. And the rule quite properly goes further. The trustee may not act for his trust whenever he has an adverse personal interest which will be served thereby. When the trustee is acting for himself, he is disqualified to act for his trust. When self-serving interest enters, trustee power passes out.

No reason appears why this officer of the Savings Bank took over this trust in his individual capacity, in August, 1932, at a time when it is common history that the country

was passing through a devastating financial depression. For some undisclosed reason, without any suggestion of advantage to this estate, in this crisis, Mr. Carter chose, for it must be assumed that it was of his choosing, to take into his individual control those large liquid assets, on execution of a ten thousand dollar bond. Within a little more than four months later the East Tennessee National Bank failed. Mr. Carter had been actively connected with these Banks for many years, much of the time as President of both, and, in January, 1933, he was chairman of the Board. It is true that we find no evidence in the record of his active participation in the reorganization and it is stipulated that he was not responsible for the preparation of this Reopening Plan, doubtless the work of legal and bank accounting experts, but it cannot be doubted that this was a matter of not only great financial consideration to him as a stockholder and director and salaried officer, but appealing strongly to his pride and sense of responsibility to the sixteen thousand depositors of nearly ten million dollars in this institution to which his name had contributed standing.

He was confronted with loss, not only of his personally held stock and an assessment thereon, but, of far more importance to him, the wide spread community calamity which the crash of this great financial institution threatened, and the condemnation by the public of those, who, along with himself, had been its responsibile managers. He was also apprehensive, no doubt, of an aftermath of litigation, including suits, as elsewhere prosecuted under like conditions, to enforce against himself and associates directorship liability in large sums. Thus Mr. Carter doubtless saw, as did his companions, in an agreement in some form for at least temporary reorganization, the only prospect of relief. These considerations must have far outweighed any interest which he had in common with the trust for which he undertook to act along with himself. In other words, we think it inescapable that Mr. Carter had a benefit to himself to attain, not shared in by his trust, which operated as at least a subconscious inducement. Now this violates the "universale rule that a trustee will not be allowed to deal with a trust estate for his own benefit." 26 R. C. L., 1322.

Or, as expressed by the Georgia Supreme Court, a trustee "owes an undivided duty to his beneficiaries and must not place himself in a position where his personal interests will conflict with them." A trustee whose individual interest "may conflict with his duties as trustee" is subject to removal as such, and is disqualified to act for his trust estate. See 65 C. J., p. 619, and notes, among them this quotation, which well expresses this sound and general rule, from the New York case of *Pyle* v. *Pyle*, 122 N. Y. S., 256, 259, affirmed in 199 N. Y., 538:

"It is a fundamental rule relating to the acts of a testamentary trustee, that he must not only act for the benefit of the trust estate, but also in such a way as not to gain any advantage, directly or indirectly, except such as the law specifically gives him, for himself. He owes an undivided duty to his beneficiary, and he must not, under any circumstances, place himself in a position whereby his personal interest will come in conflict with the interest of his cestui que trust. * * * The purpose sought to be secured by this rule of law is to require a trustee to assume a position where his every act is above suspicion and the trust estate, and it alone, can receive, not only his best services, but his unbiased and uninfluenced judgment. When he has acted otherwise, or when he has placed himself in such a position that his personal interest has or may come in conflict with his interest as trustee, then, so far as I have been able to discover, the court never hesitates to remove him. Under such circumstances, the court does not stop to inquire whether the transactions complained of were fair or unfair. It stops the inquiry when the relation is disclosed."

While by no means on all fours on its facts with the case at bar, the opinion of the Wisconsin Supreme Court in *In Re Filardo*, reported in 105 A. L. R., page 438, and the annotations following, contain excellent statements of the rules governing the conduct of testamentary trustees, with special reference to the voidable nature of all transactions involving the trust estate had by a trustee with himself or in any degree for his own advantage. In both the reported

case and in the annotations this quotation is approved from *Ottawa Bank & Trust Co.*, v. *Crookston Bank, et al.*, 185 Minn., 22, 239 N. W., 666: "When a trustee trades the trust property to himself, or to his advantage, his cestui (or a successor trustee) may avoid or affirm it as he chooses, without showing damage, though no actual fraud is practiced * * * the law will not permit him to submit himself to the temptation of acting in his own interest rather than with fidelity to his trust." In this Minnesota case the Trustee of the estate was at the same time an officer of a bank with which he undertook to deal for his trust. This the Court held he could not bindingly do, whether in good faith or not, and regardless of the loss or gain resulting.

Our own decisions are in accord. Indeed, nowhere do we find a stronger statement than that of our own great equity jurist, Cooper, J., in the course of his learned opinion in Cannon *v.* Apperson, 82 Tenn., at page 579, where he wrote that "No principle is better settled or founded upon a sounder basis of legal ethics and positive law than the principle which declares that whoever undertakes to act for another in any manner shall not, in the same matter, act for himself, and this without regard to the fact whether he has or has not made a profit by the act. Equity disallows the measure without reference to advantages or unfairness, and treats it as a breach of trust, charging the trustee accordingly. Perkins *v.* McGavock, 3 Hay, 265. The authorities are uniform to this effect." The language of Judge Cooper was taken almost verbatim from the opinion of White, J., in the McGavock case, which is only one of our decisions announcing the principle. Chancellor Gibson lays down, as a maxim, the rule that "No man bound to act for another in any matter can, as to that matter, act for himself." Suits in Chancery, par. 46.

Certainly a court of equity will not lend itself to the enforcement of an obligation against a trust estate which the trustee acting was thus disqualified to create. In the instant case, as has before appeared, Mr. Carter was a leading officer of the Bank which was proposed to be reorganized under this Plan. It was his duty, as such, and greatly to his personal advantage, to bring about this reorganization. In entering into this heavy obligation he was

acting in a dual capacity, on the one hand as trustee for this estate and on the other as an officer of this Bank. This being so, he was disqualified to act, even if it should be conceded that he had been vested by the general terms of the will of the testator with power to so bind this trust estate.

It will be recalled that a paper signed by the chief beneficiary of this trust, in the nature of a spendthrift trust, Mrs. Nina Harris, is offered by the Trustee to support the action of Carter, by estoppel, or otherwise, and it appears that the learned Chancellor gives this great weight, but we are unable to do so. If any one thing is made plain on the face of this will it is that this husband sought to protect his widow from the effects of any voluntary, or induced, control or disposition by which she might in any manner or degree affect this trust estate. Any theory that this trust estate could be affected by her action is directly in the teeth of the clearly indicated wishes of the testator. It was not within the power of a beneficiary of this spendthrift trust to thus thwart the purpose of the donor; such is the holding of this Court, in principle, in *Vines* v. *Vines,* 143 Tenn. 517, at pp. 534, et sequi.

We deem it unnecessary to prolong this opinion by discussion of other questions presented on the able briefs of counsel. On the grounds indicated, the decree of the Chancellor must be reversed and judgment entered in favor of the appellant Bank Trustee for the cancellation of the note and possession of the pledged securities.

CHAMBLISS, *J.*

Knox Equity.

M. O. COWAN, et al., *Trustees,*

v.

HAMILTON NATIONAL BANK, *Trustee.*

Memorandum on Petition to Re-hear.

Counsel file a vigorously protesting petition to rehear, challenging what counsel treat as assumptions of this Court upon which the opinion was rested. The record in this

cause and the able briefs of counsel were given very careful consideration by the members of this Court in appreciation of the importance of the issues involved. We respond briefly to the statements made in this petition in the hope of relieving what appears to be misapprehension on the part of counsel as to the basis of the opinion.

In paragraph I counsel states that, "This decision is, in part, based on the assumption that the Estate of Hal S. Harris might not have been liable for the assessment," etc. It was not our intention to so base the decision even in part. That portion of the opinion to which counsel obviously refers was written in the course of the argument that it was the duty of the Trustee to submit the question of whether or not he would obligate this Estate to the Court, the possibility being suggested in this connection that it might appear to the Court that the liability for this double assessment might be that of the Trustee, as between himself and the Estate, in view of the circumstances set forth showing that this improvident investment had been maintained, despite information which the Trustee should have had touching its wisdom and safety; and also by way of demonstrating the dual relationship which we found to disqualify this Trustee.

In paragraph II it is said that, "This decision is based, in part, on the assumption that the Estate of Hal S. Harris might have avoided all liability by not joining in the reorganization plan." Counsel sharply challenges this "assumption" as "contrary to the truth," etc. While this was not the determinative ground on which the decision was based, it is true that the Court was of opinion that by following a different course the Trustee might have avoided all liability. The opinion sets forth quite fully our views with respect to this and upon a re-reading we are quite satisfied with what is there said. It plainly appears, we think, that if the Trustee had withheld action, as did many other holders of the stock, no liability would have resulted. We think it unnecessary to repeat what is said in the opinion on this subject.

In paragraph III it is said that, "This decision is based, in part, on the assumption that Carter, Trustee, was acting

in bad faith to accomplish antagonistic personal ends," etc. The decision is not so based and it expresses no such assumption. On the contrary, the opinion disclaims any intention to impute to Mr. Carter "a wrongful purpose, or a conscious bias." Throughout the opinion a distinction is recognized and applied between bad faith and subconscious influence resulting from the circumstances and situation. And the rule of law we applied, which disqualifies a Trustee, operates, as shown by quotations embodied in the opinion, without regard to whether the Trustee acts "in good faith or not, and regardless of the loss or gain resulting."

Finally, in paragraph IV, counsel re-argues with much vehemence the insistence made in his original brief that the situation presented to the Trustee at that time but two alternatives. We undertook in the opinion to express our views clearly on this proposition and we can add nothing to what has there been said.

The opinion sustains two assignments, Nos. 5 and 12. Perhaps much was unnecessarily said in the course of the opinion by way of argument, or illustration. We did express the view, in response to argument, that the action taken was too hasty and was ill advised and that the Trustee, in view of the history of the case, did not exercise that prudence and good judgment which the rule invoked by counsel demanded. And the opinion was, also, expressed that an obligation rested, for the many reasons advanced, upon the Trustee to submit this delicate and dangerous question involving this trust to the Court before acting. However, the decision was rested upon two propositions chiefly, (1), sustaining the fifth assignment, that the will vested no authority in this Trustee to enter into this obligation; and, (2), sustaining the twelfth assignment, that the Trustee, under all the circumstances set forth, was manifestly disqualified from acting on behalf of his trust, and this without regard to whether or not he acted in good faith. Counsel is referred, for an expression of our considered views, to the closing portion of the opinion in which we deal with the twelfth assignment. Here will be found a statement of the determinative grounds upon which it was the intention to rest the decision. We have there stated

reasons that appeared and now appear to us to be absolutely conclusive upon the proposition that Mr. Carter was acting in a dual capacity, being at the same time an officer of the Bank and the Trustee of the Harris Estate, and was disqualified to act on behalf of his trust.

The petition must be dismissed.

CHAMBLISS, *J.*

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

No. 1030.

M. O. COWAN, D. C. WEBB and VICTOR KLEIN, Trustees Under the Plan and Agreement for Reopening the East Tennessee National Bank,

Petitioners,

vs.

HAMILTON NATIONAL BANK OF KNOXVILLE, as Trustee for the Estate of Hal S. Harris,

Respondent.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

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Respondent.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

To the Honorable the Supreme Court of the United States:

I.

OPINIONS OF THE COURT BELOW.

The opinion of the Supreme Court of Tennessee may be found in **146 S. W. (2d) 359**, but has not been officially reported. The opinion is found in the record (R. 70-85). The opinion on the petition to rehear is in the record (R. 103-105).

II.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under the Judicial Code, Sec. 237 (b), as amended by the Act of February 13, 1925 [Title 28, U. S. C. A. 344 (b)].

Petitioners, in their brief, have set up and claimed rights, privileges and titles under Title 12, U. S. C., Sec. 207, and Title 12, U. S. C., Sec. 66. Petitioners argue that the Supreme Court of Tennessee, in reversing the decision of the Chancellor, denied to petitioners rights, privileges and titles under said statutes. Respondent denies that there was any title, right or privilege set up or claimed by petitioners under any statute of the United States. The decision of the Supreme Court of Tennessee was based entirely on non-Federal questions. The decision of the Supreme Court of Tennessee was based primarily upon the proposition that the will of Hal S. Harris, under which the then Trustee, S. V. Carter, was purporting to act, vested no authority in the Trustee to enter into the Plan and Agreement for the Reopening of the East Tennessee National Bank, sign the promissory note and pledge collateral of the trust estate as security therefor, and that the Trustee was disqualified from acting on behalf of his trust since the Trustee was acting in a dual capacity, being at the same time an officer and director of the East Tennessee National Bank and the Trustee of the Harris estate (R. 103-105). No Federal question was involved. The Court did not undertake to construe Title 12, U. S. C., Sec. 207, or Title 12, U. S. C., Sec. 66. The only questions involved in the decision were questions of local law, dealing with the construction of the will of a Tennessee resident and the capacity of a Trustee under said will to bind his trust by contract, by pledge and by promissory note. This is not a suit in which the liability for an assessment is contested.

Further consideration of the jurisdiction of the Court will be given in the argument below.

III.

STATEMENT OF THE CASE.

This suit was brought by petitioners in the Chancery Court of Knox County, Tennessee, seeking judgment on a $28,000.00 note executed to petitioners by a former Trustee of the estate of Hal S. Harris, deceased, and for decree subjecting securities attached to said note as collateral security to the satisfaction thereof, and for perpetual injunction prohibiting respondent, Hamilton National Bank, Trustee, from prosecuting a suit in detinue previously brought in the Circuit Court of Knox County, Tennessee, seeking recovery of possession of the securities attached as collateral to said note (R. 1-12). Respondent filed motions, pleas and demurrers which were overruled by the Chancellor. Respondent filed an answer and cross bill wherein it set up all defenses contained in the previous motions, pleas and demurrers, and made a complete answer to all averments of the bill and asked for positive relief. Respondent prayed that the contract entered into by S. V. Carter, former Trustee, referred to in the record as the Plan and Agreement for the Reopening of the East Tennessee National Bank, be declared to be beyond the powers of the Trustee to execute, unlawful and void as to the trust of the respondent, Hamilton National Bank, Trustee; that the note executed by said Carter, Trustee, and sued on in this cause be likewise declared unlawful and void and delivered to respondent for cancellation and destruction; that the attempted pledge of the collateral to said note be declared beyond the powers of the Trustee and the attempt to pledge the same be declared null and void; that petitioners be compelled to return to respondent all the pledged collateral set out and described in the original

bill; that as a matter of law S. V. Carter, former Trustee, was not in position to act impartially and judicially in the transaction whereby he, as Trustee, signed the Reopening Agreement, executed the note and pledged the collateral (R. 25-37, 62).

The parties agreed that the cause might be heard by the Chancellor upon the record and upon the written statement of facts. The written agreement as to the facts was filed as evidence in the cause (R. 26-42). The Chancery Court awarded petitioners a decree as prayed for. From this decree respondent appealed to the Supreme Court of Tennessee, which court, on January 2, 1941, reversed the decree of the Chancery Court of Knox County, Tennessee, and on March 8, 1941, overruled petitioners' petition for rehearing. The Supreme Court of Tennessee sustained the cross bill of this respondent, nullified the action of the former Trustee of the Harris estate in his attempted execution of the reopening contract or agreement, ordered the note returned and canceled and a return of all the collateral securities to this respondent as Trustee of the Harris estate.

STATEMENT OF FACTS.

Hal S. Harris died testate in 1927 and his last will and testament was duly probated in the County Court of Jefferson County, Tennessee. Under the provisions of said last will and testament the estate was placed in trust in the East Tennessee Savings Bank of Knoxville, Tennessee, as Trustee, for the benefit of Nina Harris, wife of the testator, for and during the period of her natural life, with power in her to dispose of the estate by her last will and testament. The East Tennessee Savings Bank qualified as Executor and Trustee and acted in that capacity from early in the year 1927 until the month of August, 1932, at which time said Savings Bank resigned its trust and S. V.

Carter was named as successor Trustee and he duly qualified and acted as Trustee until the date of his death in January, 1935. At the time of his death Hal S. Harris was the owner of 280 shares of the par value of $100.00 each of the capital stock of the East Tennessee National Bank. This stock passed to the Trustee and was held by S. V. Carter, Executor and Trustee, at the time of the failure of the East Tennessee National Bank on January 19, 1933. On or about January 19, 1933, a Receiver was appointed for said bank. On April 5, 1933, the Comptroller of the Currency levied a 100 per cent assessment upon all the stockholders of said East Tennessee National Bank. The assessment was payable May 12, 1933, the stockholders having the privilege of paying 25 per cent May 12, with guaranteed obligation to pay the balance—25 per cent June 12, 1933, 25 per cent July 12, 1933, and the remaining 25 per cent August 12, 1933. A Plan and Agreement for reopening said East Tennessee National Bank was prepared by interested parties and was submitted to the Comptroller of the Currency, who, on April 20, 1933, approved said Plan and Agreement, subject to certain conditions set out in his letter of that date addressed to the Receiver of the East Tennessee National Bank. On May 10, 1933, S. V. Carter, undertaking to act as Trustee under the will of Hal S. Harris, deceased, signed the Reopening Plan and Agreement (found in the record at pages 106-122) and executed a $28,000.00 note to C. H. Baker, M. O. Cowan and Charlton Karns, Trustees under said Reopening Agreement, and delivered to said Trustees certain collateral as security for the payment of said note. The Trustee, S. V. Carter, became connected with the East Tennessee National Bank in 1887, was for many years a Director and Cashier of said bank, and became President of said bank in January, 1926, and finally became Chairman of the Board of Directors, which office he held at the time the

bank went into receivership. S. V. Carter was a substantial stockholder in said bank, and at the time of the bank's receivership he owned 300 shares of stock in said bank of the par value of $100.00 per share. On December 21, 1933, the Comptroller of the Currency declared the Reopening Agreement effective and he revoked the assessment theretofore made against stockholders of said East Tennessee National Bank, both as to the stockholders who signed said Reopening Agreement and those who did not. No stockholder who failed or refused to sign said Reopening Agreement or to execute a note pursuant to the terms thereof had to pay anything on said stock assessment made by the Comptroller of the Currency. All non-signing stockholders who did pay their assessment had their money returned to them by the Receiver and suffered no loss whatever by reason of such stock assessment.

The note which S. V. Carter executed as Trustee matured on January 10, 1940. On January 5, 1940, respondent, Hamilton National Bank, Trustee, which became Trustee of the estate of Hal S. Harris following the death of S. V. Carter in January, 1935, caused demand to be made upon the petitioners for the return of the collateral pledged by said S. V. Carter to the Trustees under the Reopening Agreement. On January 17, 1940, respondent, Hamilton National Bank, Trustee, commenced a suit in the Circuit Court of Knox County, Tennessee, seeking recovery of the collateral from the Trustees under the Reopening Agreement, petitioners herein. On February 9, 1940, this suit was commenced in the Chancery Court of Knox County, Tennessee.

The Supreme Court of Tennessee, in its decision, found it necessary to construe the will of Hal S. Harris. That Court held that the will clearly did not authorize Carter as Trustee to execute the Reopening Agreement, sign the note and pledge the trust assets as collateral thereto. The

Court further held that S. V. Carter as Trustee was disqualified from acting on behalf of his trust, since he was acting in a dual capacity as an officer of the East Tennessee National Bank and as the Trustee of the Harris estate (R. 70-85, 103-105).

IV.

THE QUESTIONS PRESENTED.

Respondent insists that there is no question at all presented by petitioners for determination by this Court. There is no Federal question. Petitioners, under Section III on page 10 of their petition for certiorari, have attempted to state three questions presented to this Court. The first question is entirely inaccurate, in that it assumes that the trust estate had legally consented to the Plan of Reorganization. Such an assumption is entirely unsupported by the facts. The main question in the Tennessee Court was whether the trust estate did, through its Trustee, legally consent to the Plan.

The second question presented by petitioners assumes that entry into the agreement for reorganization was compulsory. The matter of joining in it was purely voluntary with all interested parties. Stockholders could enter into the contract if they wanted to or they could decline if they chose to do so.

The third question presented by petitioners erroneously assumes that a binding and valid note was executed by the trust estate. The Supreme Court of Tennessee has held that the note was a nullity and that the trust estate was not bound by it. The question also erroneously assumes that the execution of the note became an asset of the bank; that because of the note the bank was restored to solvency and the assessment revoked. The note did not become an asset of the bank. The note was a nullity. It did not bind the trust estate. The execution of the note

had nothing to do with the restoration of the bank to solvency. The bank was restored to solvency regardless of the attempted execution of this note by the Trustee of the Harris estate. The assessment against the estate was not revoked because of the note.

The question for decision in the courts of Tennessee was whether the estate of Hal S. Harris, deceased, owning stock in the East Tennessee National Bank, was liable to the Trustees under the Plan and Agreement for Reopening the East Tennessee National Bank on a promissory note executed by a former Trustee of the estate who had no power, authority or capacity under the trust instrument to obligate his estate to the reopening agreement, and on a promissory note and by pledge of collateral belonging to the estate to secure the note. The Supreme Court of Tennessee held that the trust estate was not bound by the promissory note because the Trustee's attempted execution thereof was without authority under the will and contrary to law.

V.

ARGUMENT.

1.

There being no substantial Federal question, the petition for writ of certiorari should be denied for want of jurisdiction. The decision of the Supreme Court of Tennessee was based on non-Federal questions. In dismissing the petition to rehear, the Supreme Court of Tennessee said:

> "However, the decision was rested upon two propositions, chiefly, (1), sustaining the fifth assignment, that the will vested no authority in this Trustee to enter into this obligation; and, (2), sustaining the twelfth assignment, that the Trustee, under all the circumstances set forth, was manifestly disqualified from acting on behalf of his trust, and this without regard to whether or not he acted in good faith."

Petitioners claimed no right, title or privilege under Federal statutes in the courts of Tennessee. The Plan and Agreement for Reopening the East Tennessee National Bank involved the making of a new and distinct debt and obligation upon those stockholders of the bank who desired to enter into the Plan. No stockholder was compelled to join therein (R. 106-122).

The Bank Conservation Act, Title 12, U. S. C., Sec. 207, contains no provision compelling stockholders, creditors or depositors to enter into any proposed reopening contract and there is no law, either state or Federal, which makes it compulsory on a stockholder, whether he be an individual or an estate of a deceased person, to enter into any such contract or to execute a note pursuant thereto, or to pledge collateral as security to said note. Certainly it cannot be effectively argued that a trust estate would be bound to pay the amount of the note and suffer a subjection of

the trust assets to the satisfaction thereof when such trust estate did not actually enter into the reopening contract, execute the note and pledge the collateral.

Respondent does not question the authority of **Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452.** That case simply holds that, so far as the statutes of the State of Iowa attempt to prohibit national banks from receiving deposits when insolvent, those statutes are invalid because they conflict directly with the Federal statutes. Neither does respondent question the authority of any other case or Federal statute cited under the first paragraph of petitioners' argument on pages 18, 19 and 20 of their brief. Those cases clearly are not in point. This suit does not involve the question of liability of a trust estate for an assessment made by the Comptroller of the Currency on stockholders of a national bank.

The capacity of parties to make contracts, execute notes and pledge collateral is determined by local law. There is no Federal common law.

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188.

The decision by a state court as to the rights of a national bank as to interest under a state statute, which merely determines the meaning of the state law as applied to all the creditors without denying equality of right to the bank or any right given by a Federal statute, does not present a Federal question.

Union National Bank of Chicago v. Louisville, New Albany & Chicago Ry. Co., 163 U. S. 325, 41 L. ed. 177.

2.

Respondent insists that a construction of the will under which Carter as Trustee was purporting to act was purely

for the courts of Tennessee. Respondent further insists that the question of authority and power of Carter, Trustee, under the will was for determination by the courts of Tennessee according to the local law. The question concerned the power and authority of a Trustee to bind his estate by contract, by promissory note, and pledge of securities belonging to the estate. In **First National Bank v. Kentucky, 76 U. S. 362, 19 L. ed. 701,** it is said of national banks:

> "They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law."

In **McClellan v. Chipman, 164 U. S. 347, 41 L. ed. 461, 466,** it is said:

> "Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank within a state in violation of the state laws on the subject of minority or coverture, was valid because such state laws were in conflict with the act of Congress or impaired the power of the bank to perform its functions. Indeed, reduced to its last analysis, the position here assumed by the plaintiff in error amounts to the assertion that national banks in virtue of the act of Congress are entirely removed, as to all their contracts, from any and every control by the state law. The argument that the concession of a right on the part of a state to forbid the taking of real estate by a national

bank for an antecedent debt, under any circumstances, implies the existence of a power in the state to forbid such taking in all cases, begs the question, and amounts simply to a restatement of the proposition already answered."

A controversy as to who holds the equitable title of stock in a national bank involves no Federal question.

Levson v. Davis, 170 U. S. 36, 42 L. ed. 939.

It has never been contended by anyone that the capacity of infants, insane persons and trustees is governed by any law other than the local law. Certainly the Bank Conservation Act (Title 12, U. S. C. 207) does not purport to legislate concerning the powers, authority and capacity of a trustee to enter into an agreement for the reorganization of a bank, execute promissory notes and pledge collateral where, under the local law and under the trust instrument, the trustee has no such power, authority or capacity.

Petitioners have stated that the "binding effect of a reorganization of an insolvent national bank" was called into question in this case. Respondent has made no attack on the validity of the reorganization of the East Tennessee National Bank. Certainly petitioners themselves, purporting to act under said reorganization, have not questioned its validity. Thus this case does not question the validity of a Federal statute nor the reorganization of a national bank under a Federal statute.

3.

Respondent denies that the trust estate "invoked a Federal law" to secure the reorganization of a national bank by which the bank was restored to solvency and an assessment of 100 per cent standing against the trust estate was

revoked as is charged by petitioners in the third paragraph of their argument. S. V. Carter, Trustee, had no power, authority or capacity to enter into a contract, to execute a note or pledge collateral of his trust. The will under which he purported to act did not give him power, authority or capacity. His acts were ineffectual as far as binding his estate was concerned. Thus, the **trust estate**, not being represented by a Trustee with capacity to bind it, invoked no law and did nothing with reference to the reorganization of the East Tennesseee National Bank.

It is true that the trust estate was the owner of stock in a national bank. Whether the trust estate was liable on the assessment made by the Comptroller of the Currency is not material here, for the reason that the assessment against all stockholders, **including those who did not sign the Reopening Agreement**, was revoked by the Comptroller of the Currency and those stockholders who did not sign the Reopening Agreement suffered no loss whatever on account of the assessment. Those stockholders who refused to sign and who paid the assessment had their money returned to them (R. 40).

Thus it is seen that the trust estate received no benefit from the reorganization of the bank. Petitioners have suggested that the recent case of **Deitrick v. Greaney, 309 U. S. 190, 84 L. Ed. 694**, is in point. That case has no bearing at all on the issues involved here. That case involved the right of a receiver of a national bank to compel payment of the promissory note knowingly given to the bank by one of its Directors as a substitute, among its assets, for shares of its own stock purchased and retained by it in violation of the provisions of the National Bank Act, with the bank's officers participating in the illegal transaction. The transaction was a violation of Rev. Stat., Sec. 5201, 12 U. S. C. A., Sec. 83. The note was a consequence of the illegal transaction. The statute precludes resort to the very acts

which it condemns as the means of thwarting those purposes of the act. The extent and nature of the legal consequences of the acts condemned as unlawful by the National Bank Act are to be derived from the National Bank Act. Here, in the present case, there is no controversy concerning "legal consequences which flow from acts condemned as unlawful by the National Bank Act." Respondent has not questioned the validity of the reorganization of the East Tennessee National Bank. There has been no contention by petitioners that respondent or its estate has committed an act condemned as unlawful by the National Bank Act.

4.

Respondent denies that the Supreme Court of Tennessee has discriminated against a national bank, its stockholders and creditors. Petitioners have suggested that the case of **Young v. Phillips, 170 Tenn. 169,** shows discrimination. The facts of that case are wholly dissimiliar to the facts of the present case and the Supreme Court of Tennessee, in its opinion in the present case, clearly distinguished Young v. Phillips, supra.

VI.

CONCLUSION.

We have shown that this Court has no jurisdiction, there being no Federal question involved. The Supreme Court of Tennessee denied no right, privilege or title under Federal statute. The decision of the Supreme Court of Tennessee was based entirely on substantial non-Federal questions involving the construction of a will and the power, authority and capacity of the testamentary trustee to bind his trust by entering into a new and distinct obligation.

The decision of the highest court of Pennsylvania upon the question, whether Pennsylvania testamentary trustees

could invest trust funds in corporate securities, was binding on the Circuit Court of Appeals.

> **Mitchell v. Ottinger, 105 Fed. (2d) 334** (Certiorari denied by Supreme Court, 308 U. S. 591, 84 L. ed. 495).

Since this case does not involve the liability of a trust estate for an assessment made by the Comptroller of the Currency, the case of **Seabury v. Green, 294 U. S. 164, 79 L. ed. 834**, and other similar cases cited by petitioners have no bearing on the issues in this case. Even in cases involving liability for assessments it has been held that the trust estate is not liable where the Trustee, without authority, invested in national bank stock. (See **Williams v. Cobb, 219 Fed. 633**, affirmed without discussion of this point in 242 U. S. 307, 61 L. ed. 325; **Bagnell v. Ives, 184 Fed. 466.**) However, those cases are also immaterial. The liability for an assessment is imposed by Federal statute. Obligations imposed by a promissory note are contractual. Contractual liability is governed by local law in the absence of a controlling Federal statute.

The failure of the Harris estate as a stockholder in the East Tennessee National Bank validly to execute the Reopening Agreement did not prevent the reopening of the bank any more than the failure of many more stockholders to enter into the reopening contract, and the attempted entry into the reopening contract by the Trustee of the Harris estate put the Harris estate in no different attitude from that of many other stockholders who failed to execute the Reopening Agreement. Certainly petitioners would not claim that any one of the many stockholders who failed to enter into the Reopening Agreement is charged with any liability thereunder, such as the obligation of a promissory note or the pledge of collateral to secure such

a note. To do so would be contrary to the agreement as to the facts (R. 40, XXIII).

When the Reopening Agreement was proposed by interested parties the estate of Hal S. Harris, deceased, was an inanimate thing. It was not a legal person. An estate is not a legal entity. It can act only through persons authorized and empowered to act for it. To bind the estate by contract or by promissory note, some one capable of representing the estate with authority and power to make the contract and execute the note must act for the estate, else the estate is not bound. Certainly the estate of Hal S. Harris cannot be penalized by the unauthorized act of one incapable of binding it.

For the reasons stated, respondent respectfully insists that the petition for writ of certiorari should be denied.

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